87 No. 1796

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

RUTH MASSINGA, *et al.*,

Petitioners,

v.

L. J., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 87-2156

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Plaintiffs - Appellees

versus

RUTH W. MASSINGA, Individually and as Secretary of the Maryland Department of Human Resources; and; FRANK FARROW, Individually and as Executive Director of the Maryland Social Services Administration; and; JOY DUVA, Individually and as Director of the Office of Child Welfare Services, Maryland Social Services Administration; and; BUD NOCAR, Individually and as Acting Program Manager Foster Care Services of the Maryland Social Services Administration; and; ALMA RANDALL, Individually and as Program Manager for 24-Hour Group Care and Licensing of the Maryland Social Services Administration and; BALTIMORE CITY DEPARTMENT OF SOCIAL SERVICES, and; GEORGE MUSGROVE, Individually and as Director of the Baltimore City Department of Social Services; and; MICHAEL WARNER-BURKE, Individually and as Chief of Protective

Services for the Baltimore City Department of Social Services for the Baltimore City Department of Social Services; and; CHERYL GIBSON, Individually and as Caseworker for the Baltimore City Department of Social Services; and; BRIDGETTE THOMAS, Individually and as Caseworker for the Baltimore City Department of Social Services; and; MARYLYN HOLCOMBE, Individually and as Caseworker for the Baltimore City Department of Social Services; and; DELORES COOPER, Individually and as Caseworker Supervisor of the Baltimore City Department of Social Services; and; GAIL FULTON, Individually and a Caseworker for the Baltimore City Department of Social Services; and; ELVIA DEWATKINS, Individually and as Caseworker for the Baltimore City Department of Social Services; and; DAWN ZINKAND Individually and as Caseworker of the Baltimore City Department of Social Services; and; JERILYN SIMMONS, Individually and as Caseworker for the Baltimore City Department of Social Services; and; ANTHONY BAIRD, Individually and as Caseworker for the Baltimore City Department of Social Services; and SUSAN LIEMAN, Individually and as Caseworker Supervisor for the Baltimore City Department of Social Services; and; ALLEN COLLINS, Individually and as Caseworker for the Baltimore City Department of Social Services; and; SUSAN ZURAVIN, Individually and as Caseworker for the Baltimore City Department of Social Services; and; EMMA GRAVES, Individually and as Caseworker for the Baltimore City Department of Social Services; and; JOHN ROES 1 THROUGH 12, Individually and as Caseworkers for the Baltimore City Department of Social Services

Defendants - Appellants

Appeal from the United States District Court for the District of Maryland, at Baltimore. Joseph C. Howard, District Judge. (CA84-4409)

Argued: December 4, 1987
Decided: February 1, 1988

Before WINTER, Chief Judge, and RUSSELL and MURNAGHAN, Circuit Judges.

Judson Paul Garrett, Jr., Deputy Attorney General (J. Joseph Curran, Jr., Attorney General of Maryland, Ralph S. Tyler, Assistant Attorney General on brief) for Appellants; William Lee Grimm (Ethel Zelenske; Legal Aid Bureau, Inc. on brief); Ward Baldwin Coe, III (Nevett Steele, Jr., Whiteford, Taylor & Preston; Carol R. Golubock, Children's Defense Fund on brief) for Appellees.

WINTER, Chief Judge:

Plaintiffs, present or former foster children in the custody of the Baltimore City Department of Social Services, sued twenty-one state and city officials, caseworkers and supervisors who played a role in administering Maryland's federally-funded foster care program in Baltimore City. They alleged that, as a result of defendants' maladministration of the program, they were victims of physical and sexual abuse as well as medical neglect. They sought broad interim and permanent injunctive relief to redress the deficiencies in the administration of the program and money damages.

Defendants traversed the claims for injunctive and monetary relief and also specially pled their good faith immunity to damages for plaintiffs' claims prior to 1980 and our holding in Jensen v. Conrad, 747 F.2d 185 (4 Cir. 1984), cert. denied, 470 U. S.

1052 (1985).

The district court heard and decided defendants' claim for qualified immunity and plaintiffs' claim for interim injunctive relief. It granted a preliminary injunction requiring defendants to submit a plan for review of foster homes about which a report of maltreatment has been made, to monitor child placements in foster homes at least monthly and in some instances weekly, to expand its medical services to foster children including the keeping of medical records, and to provide prompt written reports of maltreatment of foster children to their attorneys and the juvenile court including the action taken thereon. It denied defendants' claim of immunity, and it imposed attorneys' fees and expenses as sanctions on defendants, in an amount yet to be determined, for their failure to comply with two court orders.

Defendants appeal, and we affirm.

I.

As a preliminary matter, we state our jurisdiction to entertain all aspects of this appeal. We, of course, have jurisdiction to review the grant of a preliminary injunction by the express language of 28 U.S.C. §1292 (a)(1). We also have jurisdiction to review the district court's denial of defendants' claim of qualified immunity under the holding in Mitchell v. Forsyth, 472 U.S. 511 (1985). We proceed therefore to review the correctness of both rulings.

II.

In concluding to grant a preliminary injunction, the district court correctly considered each of the factors set forth in the leading case in this circuit, Blackwelder Furniture Co. v. Seilig Mfg. Co., 550 F.2d 189 (4 Cir. 1977). There we held that four factors are to be considered: (1) the like-

lihood of irreparable harm to the plaintiff if the preliminary injunction is denied, (2) the likelihood of harm to the defendant if the requested relief is granted, (3) the likelihood that the plaintiff will succeed on the merits, and (4) the public interest. See Federal Leasing, Inc. v. Underwriters at Lloyd's, 650 F. 2d 495, 499 (4 Cir. 1981). As Blackwelder set forth, the two most important factors are the likelihood of irreparable harm to the plaintiff if interim relief is not granted and the likelihood of irreparable harm to the defendant if interim relief is granted. The two factors should be weighed against one another, and if the balance is in favor of the plaintiff, it is proper to grant interim injunctive relief if grave or serious questions are presented for ultimate decision. Blackwelder, 550 F. 2d at 196. See also Jones v. Bd. of Governors of Univ. of North Carolina, 704 F.2d 713, 715 (4

Cir. 1983); Fort Sumter Tours, Inc. v. Andrus, 564 F.2d 1119, 1124-25 (4 Cir. 1977).

The district court found that there was the likelihood of irreparable harm to the plaintiffs if interim relief were not granted on a dual basis. It found this likelihood as a matter of fact after conducting an evidentiary hearing at which it heard testimony and received other evidence, and it found this likelihood as a matter of law as a sanction for certain defaults and omissions on the part of defendants' lawyers. Because we think that the factual finding of the likelihood of irreparable harm to plaintiffs is not clearly erroneous, we conclude that it is unnecessary for us to consider the appropriateness of the sanction that it be considered as established "that defendants fail to protect effectively children in foster homes where there is reason to know that such children are at risk of harm to their physical

and emotional well-being.[1/] We express no view of the appropriateness of the additional sanction of attorney's fees and expenses in an amount yet to be determined. While the record reflects some defaults on the part of defendants' counsel, we do not think that this aspect of the case is properly before us until the amount and form of the sanction are fixed.

As a factual matter, plaintiffs presented a statistical study of the case records maintained by the officials on children in foster care prepared by an expert in research methodology and child welfare services. The study documented systemic problems in the Baltimore foster care program with grave consequences to children in the program and great likelihood of irreparable harm. In addition there was testimony by relatives and

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1/ Order of the district court entered July 27, 1987. J.A. 506.

expert witnesses regarding the cases of sixteen children who had recently been severely abused or neglected, or both, while in foster care. Finally there was testimony from several experts on foster care to the effect that there were systemic deficiencies in the foster care program which placed the children at substantial risk of severe harm, including the testimony of two physicians experienced in the medical care provided to children in foster care, who concluded that defendants were failing to take responsible measures to ensure foster children essential and basic medical care, placing them at risk of severe diseases and other illnesses.

Defendants sought to counter this proof by attacking the methodology of the statistical sample and evidence of the so-called Report of the Harris Task Force, an internal study, which detailed deficiencies in the foster care program and made recommendations

for their alleviation, together with proof of the corrective actions they had taken. As to the latter, the district court made full and persuasive findings as to why defendants' responses to the problems identified by the Harris Task Force were ineffective and incomplete, we cannot say that these findings lack full evidentiary support. Nor do we think that plaintiffs' statistical study was flawed or that its findings must be disregarded. In our view the statistical sample was significant. It was based on a random selection of 897 of the roughly 4,000 children in the foster program, which was further refined by the use of sampling criteria to a pool of 224 children. The district court found 15 well-founded cases of abuse or neglect in the sample and further indicated that the pool may contain up to 24 additional such cases. We see no abuse of discretion on the part of the district court in affording the study

substantive probative value.

Defendants' proof of irreparable injury to it should interim relief be granted was evidence of the obvious--the monetary cost and administrative inconvenience to the city and state of a more encompassing administration of the foster child care program. In addition they argued to the district court and contend before us that principles of federalism protect them against federal judicial interference in the administration of a state program, absent convincing proof of deliberate indifference on their part to the plight of the victims of maladministration, if any.

We recognize that the considerations pressed on us by defendants are weighty. We note of course that if carried to their logical extreme, federal courts would be powerless to enforce federal rights in any case where enforcement would conflict with the rights of a state. Such is not the law and

we think that, properly applied, the Black-welder test recognizes that the interests of the state are to be fully respected and over-ridden only in those instances in which the apparent denial of a federal right is so egregious that the individual right to interim relief outweighs the governmental interest to be free from federal judicial interference. The element of deliberate indifference may be a substantial factor in the aspect of this case which seeks monetary recovery, but it is of little moment with regard to injunctive relief in futuro if plaintiffs can prove that defendants are not acting lawfully. In this case we cannot say that if, as will be later shown, plaintiffs have made a showing of probable success in their claim for permanent relief, the district court improperly balanced the respective rights of plaintiffs and defendants with regard to prospective injunctive relief. Defendants' real harm is

the expenditure of money. Admittedly the supply of money is finite, but balanced against that is the emotional, psychological and physical damage to children, much of which will continue throughout their lives. In short, we see no basis on which to fault the district court on how it balanced the equities and why it concluded that irreparable damage to plaintiffs if relief were not granted outweighed the injury to defendants if relief was granted.

Finally, consistent with Blackwelder, we have no doubt that plaintiffs' case presents a grave and substantial question. Defendants do not seriously contend with respect to prospective relief that if plaintiffs prove their allegations, which they have already demonstrated have an arguably solid foundation, plaintiffs will have proven a violation of their due process rights under the Fourteenth Amendment. See Fox v. Custis, 712

F.2d 84, 88 (4 Cir. 1983) (rights may arise out of special custodial or other relationships created or assumed by the State in respect of particular persons). For the reasons that we will shortly discuss with respect to defendants' claim of qualified immunity, we think that plaintiffs will have also proven a violation of 42 U.S.C. 608(f) (1961) and its subsequent amendments. Thus we affirm the district court's judgment granting a preliminary injunction.

III.

In the district court defendants moved for partial summary judgment on the ground that they were immune to damage claims for action or non-action attributable to them prior to 1980. Later in argument before the district court and before us, they assert immunity even after 1980. Invoking the principle that immunity in the performance of discretionary duties exists where the law

governing official conduct is unsettled, their claim for pre-1980 immunity was grounded on the argument that not until the decision in Martinez v. California, 444 U.S. 277, 285 (1980), was there recognized a constitutional right to protection on the part of persons in the custody of the state, except in the prison context, and that we recognized this uncertain state of the law in Jensen v. Conrad, 747 F.2d 185 (4 Cir. 1984), cert. denied, 470 U.S. 1052 (1985). Their claim for post-1980 immunity is grounded on the argument that even now the law is uncertain as to whether they could reasonably be expected to know that placing children in their custody in an unsuitable foster home could constitute a violation of the constitutional rights of those children.2/

2/ Defendants' argument deals only with the constitutional rights of foster children, because defendants argue that the foster children have no statutory rights which are enforceable under 42 U.S.C. §1983. We touch on this argument in the text infra.

The district court placed its denial of the immunity defense on the dual grounds that (a) during the period in litigation, there existed a constitutional right to protection on the part of those in the custody of the state or having a special relationship with the state, even out of the prison context, so that defendants could have reasonably expected to know that a failure on their part to protect foster children placed by them in foster homes selected by them could constitute a violation of plaintiffs' Fourteenth Amendment rights, and (b) since 1961 plaintiffs had a statutory right, enforceable under 42 U.S.C. §1983, to the care and protection that they allege were denied, so that defendants could not be said to exercise discretion in an area in which the law respecting their duties and obligations was uncertain. We agree with the district court that defendants' statutory duty was clear and

certain and therefore they are not entitled to invoke the immunity defense. Our conclusion makes it unnecessary to decide whether plaintiffs' constitutional rights were also violated prior to 1980 if they can prove what they have alleged.

The foster care program in Baltimore City is federally funded. In 1961 the funding statute created both the obligations of those administering the program and the rights of beneficiaries thereunder. That statute was part of the Aid to Families with Dependent Children program in Title IV-A of the Social Security Act, 42 U.S. §608 (repealed by the Adoption Assistance and Child Welfare Act of 1980, Pub. L. 96-272). The original statute required states participating in the foster care program to develop "a plan for each such child [in foster care] (including periodic review of the necessity for the child's being in a

foster family home or child-care institution) to assure that he receives proper care. . . . 42 U.S.C. §608(f) (repealed in 1980). In 1980 and thereafter, the foster care program was made a separate title of the Social Security Act. 42 U.S.C. §§671, 675. Significantly, however, the duty to assure that a child in foster care receives "proper care" was continued and amplified. Titles IV-E and IV-B of the Social Security Act as it now exists contains the following relevant requirements. A State participating in the program is required to have a plan which provides for an agency "responsible for establishing and maintaining standards for foster family homes and child care institutions which are reasonably in accord with recommended standards of national organizations concerned with standards for such institutions or homes, including standards related to admission policies, safety, sanitation,

and protection of civil rights . . . ." 42 U.S.C. §671(a)(10).

In addition the eligibility of a State to receive an appropriation is conditioned upon its implementation and operation of "a case review system . . . for each child receiving foster care under the supervision of the State . . ." 42 U.S.C. §627(a)(2)(B). This requirement is repeated and amplified in 42 U.S.C. §671(a)(16), which requires a State's plan to provide for "a case plan. . . for each child receiving foster care maintenance payments . . . [and] a case review system . . . with respect to each such child."[3/] Finally, 42 U.S.C. §671(a)(9)

3/ "Case plan" and "case review system" are both elaborately defined in 42 U.S.C. §675, the relevant text of which follows:

> The term "case plan" means a written document which includes at least the following: A description of the type of home or institution in which a child is to be placed, including a discussion of the appropriateness of the placement and how the agency which is responsible for the child plans to carry out the voluntary placement agreement

requires a State's plan to provide that

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entered into or judicial determination made with respect to the child in accordance with section 672(a)(1) of this title; and a plan for assuring that the child receives proper care and that services are provided to the parents, child, and foster parents in order to improve the conditions in the parents' home, facilitate return of the child to his own home or the permanent placement of the child, and address the needs of the child while in foster care, including a discussion of the appropriateness of the services that have been provided to the child under the plan. Where appropriate, for a child age 16 or over, the case plan must also include a written description of the programs and services which will help such child prepare for the transition from foster care to independent living.

The term "case review system" means a procedure for assuring that--

(A) each child has a case plan designed to achieve placement in the least restrictive (most family like) setting available and in close proximity to the parents' home, consistent with the best interest and special needs of the child,

(B) the status of each child is reviewed periodically but no less frequently than once every six months by either a court or by administrative review (as defined in paragraph (6)) in order to determine the continuing necessity for and appropriateness of the placement, the extent of compliance with the case plan, and the extent of progress which has been made toward alleviating or mitigating the causes necessitating placement in foster care, and to project a likely date by which the child may be returned to the home or placed for adoption or legal guardianship . . . .

"where any agency of the State has reason to believe that the home or institution in which a child resides . . . is unsuitable for the child because of the neglect, abuse, or exploitation of such child, it shall bring such condition to the attention of the appropriate court or law enforcement agency."

Taken together we think that these statutory provisions spell out a standard of conduct, and as a corollary rights in plaintiffs, which plaintiffs have alleged have been denied. It is true that the statutes are largely statutes relating to appropriations, but, defendants' argument to the contrary notwithstanding, they are privately enforceable under 42 U.S.C. 1983. See Miller v. Youakim, 440 U.S. 125 (1979); Rosado v. Wyman, 397 U.S. 397 (1970); King v. Smith, 392 U.S. 309 (1968). Moreover the Supreme Court did not distinguish between prospective equitable relief and an action for money

damages in regard to the right to enforce privately in Wright v. Roanoke Redevelopment and Hous. Auth., ___ U.S. ___, 107 S.Ct. 766, 770 n.5, 773 (1987).

We therefore conclude that the district court correctly denied defendants' motion for summary judgment on the ground of immunity and we affirm its ruling. We should not be understood, however, to mean that defendants or any of them are necessarily liable for money damages. Their right to claim immunity must be determined by an objective test rather than their subjective good faith belief, see Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982), and we decide only that objectively, to the extent that they had discretion in the exercise of their duties, they would not be justified in doing or in failing to do what is alleged, if that be proven.[4/] The proof, however, of the alleged actionable nonfeasance and malfeasance must

await further proceedings in the district court.

AFFIRMED.

4/ In view of this conclusion we do not consider what discretion, if any, is vested in any particular defendant in the performance of his duties under the program.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

L. J., et al. :

Plaintiffs :

v. : CIVIL NO. JH-84-4409

RUTH MASSINGA, et al. :

Defendants :

MEMORANDUM AND ORDER

Pending before the Court is plaintiffs' complaint alleging, on behalf of themselves individually and as class representatives,

that defendants injured plaintiffs by placing them, with deliberate indifference and gross negligence, into foster homes which they had reason to know were unsuitable in violation of their rights under the Constitution, federal foster care law and Maryland common law.

The immediate matter under consideration is defendants' renewed motion for partial summary judgment filed October 20, 1986 pursuant to Fed. R. Civ. P. 56. The Court has reviewed the pleadings and finds that no hearing is necessary. Local Rule 6(G).

I.

In their motion, defendants contend that they are not liable as a matter of law for damages arising from conduct which occurred prior to 1980. Defendants note that, under Harlow v. Fitzgerald, 457 U.S. 800 (1982), government officials performing discretionary functions are generally shielded from liabil-

ity for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. 457 U.S. at 815-819. Defendants then rely on the Court's holding in Jensen v. Conrad, 747 F.2d 185 (4th Cir. 1984), cert. denied, 470 U.S. 1052 (1985), for the proposition that defendants are entitled to qualified immunity because the law establishing the right of affirmative protection to those in a custodial or other special relationship with the State was not 'clearly established' until after 1980.

Plaintiffs contend that defendants are not entitled to qualified immunity. They distinguish Jensen v. Conrad, supra, arguing that they have a "special relationship" with the state and, as such, defendants violated a constitutional right to protection that was established well before 1980. Plaintiffs

further contend that they have a long established statutory right to protection under the Social Security Act.

Of the five currently named plaintiffs seeking damages, only two, L.J. and P.G., were in the foster care system in Baltimore prior to 1980. L.J. was voluntarily committed to the foster care system by agreement with his natural mother in 1977. L.J.'s foster mother is alleged to have been unfit for the responsibility of caring for L.J. Specifically, it is alleged that L.J.'s foster mother was a chronic alcoholic who has been treated on over forty-one separate occasions for alcohol-related problems. It is further alleged that the foster mother has a history of serious mental illness including several suicide attempts. According to plaintiffs, the foster home provided L.J. was chaotic. As many as eight children and adults lived in the home and L.J. was

allegedly forced to share a bed with an 85-year-old disabled man. Throughout L.J.'s placement in this home, L.J. is alleged to have suffered both physical and emotional abuse.

P.G. was committed to the foster care system by court order on July 14, 1967 when only two weeks old. After staying in one foster home for two years, P.G. was transferred to a second foster home in March of 1969. The foster parents of the second foster home are alleged to have been unfit to serve as foster parents. It is alleged that P.G.'s medical care was largely neglected. Specifically, in March of 1973, a physician referred P.G. to the Baltimore City Hospital's Opthalmology Clinic for follow-up of a problem he discovered with her left eye. P.G. was then seen at the Opthalmology Clinic for several appointments in April and May of 1973, at which time it was diagnosed that she

suffered from amblyopia. After May of 1973, however, P.G. missed numerous appointments at the clinic and, therefore, did not receive proper medical care for her vision problems. Defendants Graves and Zuravin are alleged to have known that P.G. missed appointments at the clinic and that she was not receiving proper medical care. As a result, P.G. is now blind in her left eye. It is alleged that her vision problem was still treatable while she was young. P.G.'s foster mother is also alleged to have suffered from alcoholism and eventually died from complications arising therefrom.

II.

"Good faith" or "qualified immunity" is an affirmative defense that a public official must plead. Gomez v. Toledo, 446 U.S. 635 (1980). In Harlow v. Fitzgerald, supra, 457 U.S. 800, the Court defined the elements of qualified immunity by identifying the circum-

stances in which this defense is not available. The Court noted that "[i]mmunity generally is available only to officials performing discretionary functions" because, "[i]n contrast with the thought processes accompanying 'ministerial' tasks, the judgments surrounding discretionary action almost inevitably are influenced by the decision-maker's experiences, values, and emotions." 457 U.S. at 816. Moreover, a claim of qualified immunity is also defeated where an official "knew or reasonably should have known" that his conduct violated "clearly established statutory or constitutional rights." Id. at 815-818.

These principles were applied in Jensen v. Conrad, supra, 747 F.2d 185. There the Court heard the appeal of two civil rights actions brought against state and county agency officials on behalf of two children who died after suffering brutal beatings at

the hands of their guardians. Neither of the children were foster children placed in foster homes. One of the two children, Sylvia Brown, had been admitted to a hospital suffering from a fractured skull. At that time, the hospital learned that the mother of the girl had a boyfriend who had "held the child by the head and neck, and slapped the child in a rough manner." 747 F.2d at 187. The hospital reported this to the county department of social services, and the department reached an agreement with the child's mother requiring the mother and the child to reside in the home of Sylvia's grandmother. Under the agreement, if the mother returned to her home with the child, Sylvia would then be placed in the custody of the department. Id. at 187-188. It was alleged that, over the next two months, it was known to the department that the child was living with the mother alone in the mother's home and that no

action was taken to enforce the agreement. Shortly thereafter, the child was brought to the hospital where she was pronounced dead of a brain hemorrhage. The mother subsequently plead guilty to involuntary manslaughter. Id. at 188.

In the case of the second child, Michael Clark, a school principal informed a county department of social services that the child's older brother showed signs of child abuse. A department caseworker met with the older brother immediately and learned from the child that his father hit him on several occasions. The caseworker concluded that a meeting with the mother was necessary; however, after repeated attempts to locate her, the department classified the case as "unfounded." Shortly thereafter, Michael was beaten to death by the mother's boyfriend who was subsequently convicted of the child's murder. Id.

In both the Brown and Clark cases, plaintiffs contended before the district court that a South Carolina statute requiring the reporting of child abuse and certain steps to safeguard endangered children created a "special relationship" between the state and the victims of suspected child abuse. Plaintiffs argued that the special relationship existed because the provisions of the reporting statute placed an affirmative duty on the state government to protect endangered children. Id. at 189. Relying primarily on a previous Fourth Circuit decision, Fox v. Custis, 712 F.2d 86 (4th Cir. 1983), the estates of the children contended this "special relationship" gave rise to a right to affirmative protection by the state under the fourteenth amendment. Id.

In the Brown case, the district court ruled that plaintiff's complaint failed to

state a claim under 42 U.S.C. §1983 because the fourteenth amendment only created a right to affirmative protection by the state where the state had legal custody or control of the victim. Id. at 189-190.

The district court in Clark granted summary judgment in favor of the commissioner of the department of social services and members of the state board of social services because it concluded that there was no clearly established law defining the due process requirements of South Carolina's child protection law in 1980 at the time of Michael Clark's death. Accordingly, these defendants were entitled to good faith immunity. Id. at 189.

As for the caseworkers, however, the district court refused to grant summary judgment in their favor because, unlike the commissioners and board members, their activities were not discretionary and thus not subject to qualified immunity. The court

wrote:

> The same argument, however, cannot be made in favor of the caseworkers. The obligations of protective service caseworkers are specifically defined in Section 20-7-650. The requirements which must be satisfied are clearly established, thereby providing proper notice. Therefore, caseworkers who act in violation of these requirements cannot be reasonably held to have acted in "good faith." None of the purposes behind the Harlow objective good faith immunity rule would be served by such a decision. When a governmental official acts in violation of a specific statute which has a direct bearing on his official conduct and of which it is reasonable to expect him to be knowledgeable, a resulting lawsuit cannot be reasonably characterized as "insubstantial." Nor will holding that official liable in such a case constitute unfair punishment or place undesirable restraints on his flexibility.

Administratrix for the Estate of Clark v. Jensen, 570 F.Supp. 114, 127 (D.S.C. 1983), aff'd, 747 F.2d 185 (4th Cir. 1984). The Fourth Circuit declined to review the denial of summary judgment as to these defendants. 747 F.2d at 187 n.1.

On appeal, the Court of Appeals first stated that the threshold issue was "whether the fourteenth amendment affords the appellants a right to affirmative protection by

the state, and if such a right presently exists, whether it was established clearly enough at the time the alleged deprivation occurred to avert the application of good faith immunity under Harlow." 747 F.2d at 190.

The court noted that the debate over affirmative duty stems in large part from Estelle v. Gamble, 429 U.S. 97 (1976), where it was held that prison officials could not act with "deliberate indifference" toward the medical needs of prisoners. Id. The Court of Appeals further noted that in Estelle, the Supreme Court had reasoned that since the prisoner was, because of the deprivation of his liberty, unable to care for himself, it was only just that the public be required to care for him. 747 F.2d at 191 (citing Estelle, supra, 429 U.S. at 103-104).

Calling it the "first major post-Estelle decision," the Court then reviewed Martinez

v. California, 444 U.S. 277 (1980). In that case, the Court addressed the question of whether the State of California had an affirmative duty under the fourteenth amendment to protect a private citizen from a mentally disturbed sex offender who had been sentenced to twenty years, but paroled after five. In ruling that the plaintiff had failed to state a §1983 claim, the Martinez Court chose not to decide the plaintiff had a constitutional right to protection under the fourteenth amendment. Rather, the Court held that the plaintiff had failed to establish proximate cause because the parolee was not the agent of the parole board and the victim had been murdered five months after the parolee's release. 747 F.2d at 191 (citing Martinez, 444 U.S. at 285).

In reviewing the Martinez decision in Jensen, the Court of Appeals placed special emphasis on the last paragraph of the

Martinez decision by quoting it as follows:

> We need not and do not decide that a parole officer could never be deemed to "deprive" someone of life by action taken in connection with the release of a prisoner on parole. But we do hold that at least under the particular circumstances of this parole decision, appellants' decedent's death is too remote a consequence of the parole officers' action to hold them responsible under the federal civil rights law.

747 F.2d at 192 (quoting Martinez, 444 U.S. at 285).

The Jensen Court then noted that in 1981 the Second Circuit attempted to resolve the question left open by Martinez in Doe v. New York City Department of Social Services, 649 F.2d 134 (2d Cir. 1981) (Doe I). Significantly, the allegations in the Doe case are similar to those in the case at hand. In Doe, foster children in the custody of the State of New York were beaten and sexually abused by their foster fathers. The children filed suit in 1979 alleging that the state violated an affirmative duty of protection when it failed to inspect and recertify the

foster homes to which they had been assigned over a period of time running from 1964 to 1977. The Jensen Court wrote of the decision in Doe that:

> Without expressly mentioning the fourteenth amendment, the court held that the State could violate a "constitutionally protected liberty or property interest" by failing to protect an individual who had been placed in the government's "custody or care." In its discussion the court cited Estelle v. Gamble and other eighth amendment prisoner cases. This citation was significant, for it marked the first time that the eighth amendment analysis had been applied to a traditional fourteenth amendment claim involving liberty and property interests.

747 F.2d 192 (citing Doe, 649 F.2d at 141).

The Jensen Court continued that "[o]ne year later, Seventh Circuit refused to distinguish Martinez, ruling that "there is no constitutional right to be protected by the State against being murdered by criminals or mad men." 747 F.2d at 192 (quoting Bowers, 686 F.2d at 618). Nevertheless, the Jensen Court pointed out that in deciding Bowers, the Seventh Circuit "was careful to limit its holding to situations where the state had not

taken an active role in placing an individual in a position of danger." 747 F.2d at 192. The Court then quoted Bowers where it is written:

> We do not want to pretend that the line between action and inaction, between inflicting and failing to prevent the infliction of harm, is clearer than it is. If the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit.

Id. (quoting Bowers, 686 F.2d at 618).

The Court went on to emphasize that "[i]t was here, the [Bowers] Court reasoned, that a fourteenth amendment claim based on an affirmative duty overlapped with the affirmative duty recognized by the Supreme Court in eighth amendment prisoner cases." 747 F.2d at 192. The Court in Jensen went on to point out that:

> Significantly, the court did not draw a distinction between "custodial" and "other" relationships. In this sense, Bowers moved one step beyond Doe. Rather than implicitly limiting governmental liberty to custodial relationships the Bowers court chose to speak in broader terms;

> in the court's view, it was not the precise type of relationship that mattered, but whether the government had placed an individual in danger.

747 F.2d at 193.

Having reviewed Estelle, Martinez, Doe and Bowers, the Court turned its attention to its own opinion in Fox v. Custis, supra, 712 F.2d 86, where the Fourth Circuit followed the same analytical approach adopted in Bowers. 747 F.2d at 193. In Fox, a young woman suffered injuries when a parolee set fire to her house. The parolee had previously been sentenced to twenty years in prison as the result of a prior arson conviction. Nevertheless, despite several violations of his parole, parole was not revoked.

The Court first decided that, as in Martinez, the injuries suffered by the victim in Fox were too remote to constitute a deprivation of constitutional rights under §1983. 747 F.2d at 193 (citing Fox, 712 F.2d

at 87). Nevertheless, because the case in favor of finding proximate cause was stronger than in Martinez, the Court decided to examine whether the plaintiff had asserted a cognizable constitutional claim under the fourteenth amendment. In reviewing Fox, the Jensen Court emphasized that "[c]iting Bowers, we held that a duty could arise out of a special 'custodial or other relationship.'" 747 F.2d at 193. The Court then quoted its decision in Fox as follows:

> With one qualification, we agree with the Seventh Circuit's recent holding that, in general, there simply is "no constitutional right to be protected by the state against ... criminals or madmen," and that because in corollary, there is no "constitutional duty [on the state] to provide such protection, its failure to do so is not actionable under section 1983." Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982). The qualification--an important one actually acknowledged by the Bowers court, id.--is that such a right and corollary duty may arise out of special custodial or other relationships created or assumed by the state in respect of particular persons. For example--as we have held in this circuit--such a right/duty relationship may arise under §1983 with respect to inmates in the state's prisons or patients in its mental institutions whom the state knows to be under specific risk of harm from themselves or others in the state's custody or subject

> to its effective control. Withers v. Levine, 615 F.2d 158 (4th Cir.), cert. denied, 449 U.S. 849, 101 S.Ct. 136, 66 L.Ed.2d 59 (1980) (prison inmates under known risk of harm from homosexual assaults by other inmates); Davis v. Zahradnick, 600 F.2d 458 (4th Cir. 1979) (inmate under observed attack by another inmate); Woodhouse v. Virginia, 487 F.2d 889 (4th Cir. 1973) (same as Withers); cf. Orpiano v. Johnson, 632 F.2d 1096, 1101-03 (4th Cir. 1980), cert. denied, 450 U.S. 929, 101 S.Ct. 1387, 67 L.Ed.2d 361 (1981) (no right where no pervasive risk of harm and specific risk unknown); see also Spence v. Staras, 507 F.2d 554 (7th Cir. 1974); Gann v. Delaware State Hospital, 543 F.Supp. 268, 272 (D.Del. 1982); Walker v. Rowe, 535 F.Supp. 55 (N.D.Ill. 1982) (duty of state to protect guards).

Id. at 193 (quoting Fox, F.2d, 712 F.2d at 88).

Most important for the case at hand is the Jensen Court's declaration of how the Fox decision expanded on prior case law. First the Court noted that Fox "completed the convergence of eighth and fourteenth amendment analysis that had begun in Doe and took shape in Bowers." Id. The constitutional right recognized by the Court in Fox "was clearly based on the fourteenth amendment, but the shape and definition that we gave to that

right by using the term 'custodial or other relationship' was influenced in large part by the consideration that lay behind the eighth amendment cases." Id. at 193-194. The Court added:

> Recognizing that the fourteenth amendment could not be read to establish a general affirmative duty to the public at large, we chose to limit that duty by applying a rationale similar to that used in Estelle: namely, that where the state had selected an individual from the public at large and placed him in a position of danger, the state was enough of an "active tortfeasor" to make it only "just" that the state be charged with an affirmative duty of protection. Bowers and Doe also made use of the eighth amendment analysis to address the fourteenth amendment issue, but Fox acknowledged more candidly and expressly than either Doe or Bowers the concerns that had helped to shape the contours of the duty imposed on the government.

747 F.2d 194.

The second important expansion over prior precedent contained in the Fox ruling was that "it stated in terms more explicit that Bowers that a right to affirmative protection need not be limited by a determination that there was a custodial relationship." The Fox Court ruled that "a right to

protection could arise from a custodial or other relation necessary to define the type of noncustodial relationship required to give rise to a right to affirmative protection.

The Court in Jensen held that the defendants were entitled to qualified immunity because, when the two children -- who were not in the defendants' custody -- were murdered in 1980, there was no clearly established right to affirmative protection owed to them of which the defendants should have known. "We hold only that under the facts of this case neither the state and county board members nor the caseworkers could reasonably have been expected to know that a failure to protect Sylvia Brown and Michael Clark potentially constituted a violation of their fourteenth amendment rights." 747 F.2d at 195. The Court in closing, however, noted that "[w]ere the issue properly before this court on different facts, there would be nothing to

preclude further definitions of the meaning of that term followed by a ruling that the facts of the case fell within the meaning of special 'relationship.'" Id. at 195.

Although the Court found it unnecessary to provide a comprehensive definition of "special relationship," in a footnote, the Court "underscored" three factors that it stated "should be included in a 'special relationship' analysis." Id. at 194 n.11. These factors are (1) "[w]hether the victim or the perpetrator was in legal custody at the time of the incident, or had been in legal custody prior to the incident"; (2) "[w]hether the state has expressly stated its desire to provide affirmative protection to a particular class or specific individuals"; and (3) "[w]hether the State knew of the claimants' plight." Id.

In discussing the significance of custody, the first factor, the Court suggested

that had Sylvia Brown and Michael Clark been in the state's custody, a "special relationship" giving rise to an affirmative right to protection would have existed. The Court explained that under the facts in Jensen, "as in Fox and Martinez and unlike the situations in Withers [v. Levine, 615 F.2d 158 (4th Cir.), cert. denied, 449 U.S. 849 (1980)] and Woodhouse [v. Virginia, 487 F.2d 889 (4th Cir. 1973)], the claimants were members of the general public and not in custody. The state defendants were unaware that they, as opposed to anyone else in the public at large, faced a special danger. This fact, combined with the lack of a past or present custodial relationship between the state and the perpetrators, would argue against finding that a special relationship existed." Id.

III.

Plaintiffs in the present case are foster children who were in the state's

custody at the time they allege to have been injured. It is alleged that these children were placed in foster homes, which defendants knew or should have known were unsuitable and likely to cause them injury. It is further alleged that although defendants had reason to know the foster care placements of these children were endangering them, defendants did not remove the children from those placements.

Defendants contend that Jensen is controlling authority for the proposition that, prior to 1980, the plaintiffs had no clearly established right to protection from the state while in the state's custody as foster children. As the above narration demonstrates, the focus of the Court in Jensen, was on the establishment of the rights of those not in custody to affirmative protection by the state. Unlike the allegation of plaintiffs in the present case,

the children in Jensen were not in the state's custody and had not been placed in their dangerous environment by the state. The Court in Jensen, therefore, never had before it the question of when the right of someone in custody to affirmative protection first became clearly established.

Since the children in Jensen were not in custody, the great thrust of the Court's decision was toward determining when those not in custody first had an affirmative right to protection and toward analytical basis for defining when an individual not in custody has such a "special relationship" with the state such that he is entitled to affirmative protection. The true meaning of the Jensen decision was further amplified in the first major interpretation of the decision since its issuance. In Estate of Bailey by Oase v. County of York, 768 F.2d 503 (3d Cir. 1985), a civil rights complaint was brought against

a county welfare agency by the father of a five-year-old girl who was beaten to death by her mother and mother's boyfriend. The welfare agency had previously determined that the child had been abused and agreed to return the child to the mother only upon the condition that the boyfriend be denied access to the child. The complaint alleged that the agency returned the child to the mother without conducting an independent investigation to determine whether the child's mother and mother's boyfriend were living together.

Since the child was not in custody, the District Court found that the child did not have a right to protection and dismissed the complaint. The Third Circuit began its analysis, recognizing that in Doe v. New York City Department of Social Services, 649 F.2d 134 (2d Cir. 1981) (Doe I), the Second Circuit held that "an agency that placed a child in foster care could be liable for the

child's sexual abuse by her foster parent because the agency failed to adequately supervise placement." 768 F.2d at 509 (citing Doe, (649 F.2d at 145-147). The Third Circuit chose not to address the holding in Doe, but noted that the District Court declined to follow that case because in Doe the child had been in custody.

The Third Circuit noted that the District Court had, instead, relied on Jensen in holding that plaintiff had failed to state a claim because the child in question was not in custody. The Third Circuit went on to review and comment on Jensen as follows:

> In Jensen the Fourth Circuit rejected the argument that a right of protection can never exist in the absence of a custodial relationship, and instead reaffirmed "that a right to affirmative protection need not be limited by a determination that there was a 'custodial relationship,'" 747 F.2d at 194 (citing Fox v. Custis, 712 F.2d 84 (4th Cir. 1983)). Because the court found immunity dispositive, it stated it was unnecessary to define the type of relationship required to give rise to a right of protection. It clearly suggested, however, that such a "special relationship" would exist under facts similar to those here. The factors it considered relevant were

whether the victim or the perpetrator was in legal custody at the time of or prior to the incident; whether the state had expressly stated its desire to provide affirmative protection to a particular class or specific individuals; and whether the state knew of the victim's plight. Id. at 194-95 n.11. The court stated, "Were the issue properly before this court on different facts, there would be nothing to preclude further definition of the meaning of that term followed by a ruling that the facts of that case fell within the meaning of 'special relationship.'" Id. at 195.

768 F.2d at 509. The Court concluded that "[s]ince neither of the children in the Jensen case was in the custody of the state or county agencies sued, the Fourth Circuit opinion undercuts the principal precedent on which the district court relied here." Id. at 510. Accordingly, the Third Circuit reversed the District Court. Other Courts have similarly interpreted the significance of the Jensen decision. Escamilla v. City of Santa Ana, 796 F.2d 266 (9th Cir. 1986) (children of victim of a barroom shooting were not entitled to a duty of protection because no special relationship existed between them and defendants); Dudosh v. City of Allentown, 629

F.Supp. 849 (E.D. Pa. 1985) (administrator of murder victim's estate adequately stated a claim against police by alleging failure to provide adequate police protection).

Nowhere in Jensen does the Fourth Circuit state that individuals in custody did not have a clearly established right to protection prior to 1980. Indeed, the Court implied that had the two children in Jensen been in custody, a "special relationship" would have existed and a duty of protection found owing to them by the state in 1980. In fact, the Court emphasized that "[w]e hold only that under the facts of this case neither the state and county board members nor caseworkers could have been expected to know that a failure to protect Sylvia Brown and Michael Clark potentially constituted a violation of their fourteenth amendment rights." 747 F.2d at 195. In note 11, the Court suggested that the essential fact

change that would have changed its ruling was a factual allegation that the children were in custody as opposed to not being in custody. There the Court emphasized the importance of "custody" as a factor establishing a "special relationship" in noting that "[h]ere, for example, as in Fox and Martinez and unlike the situations in Withers and Woodhouse, the claimants were members of the general public and not in custody." Accordingly, "[t]he state defendants were unaware that they, as opposed to anyone else in the public at large, faced a special danger." And "[t]his fact, combined with the lack of a past or present custodian relationship between the state and the perpetrators, would argue against finding that a special relationship existed." Id. at 194-195 n.11.

In implying its finding would have been different had the children been in custody, the Court also, necessarily, suggested that a

right to protection for those in custody existed prior to 1980.

Moreover, a basic message of the Jensen opinion is that the expanded right of protection that was extended to those not in custody as of 1980 had its legal foundation in an already established duty of protection owed to those in custody. Indeed, the Court noted that in its previous decision in Fox, "[r]ecognizing that the fourteenth amendment could not be read to establish a general affirmative duty to the public at large, we chose to limit that duty to applying a rationale similar to that used in Estelle; namely, that where the state had selected an individual from the public at large and placed him in a position of danger, the state was enough of an 'active tortfeasor' to make it only 'just' that the state be charged with an affirmative duty of protection." 747 F.2d at 194.

That the right to protection for those in custody was established well prior to 1980 was made clear by the Court when it reviewed its prior decision in Fox. The Court noted that in Fox it agreed with the Seventh Circuit decision in Bowers that there is "'no constitutional right to be protected by the state against ... criminals or madmen.'" 747 F.2d at 193 (quoting Bowers, supra, 686 F.2d at 618). However, the Fox Court expressed one qualification to its acceptance of the Bowers holding: "The qualification--an important one actually acknowledged by the Bowers court, ...--is that such a right and corollary duty may arise out of special custodial or other relationships created or assumed by the state in respect of particular persons." 747 F.2d at 193. The Court went on to point out that "as we have held in this circuit--such a right/duty relationship may rise under §1983 with respect to inmates in

the state's prisons or patients in its mental institutions whom the state knows to be under specific risk of harm from themselves or others in the state's custody or subject to its effective control." Id. The Court then cited several cases including its own 1973 decision in Woodhouse v. Virginia, 487 F.2d 889 (4th Cir. 1973), where it was held that prison inmates under known risk of harm from homosexual assaults by other inmates had a right to protection. Also cited was the 1974 case of Spence v. Staras, 507 F.2d 554 (7th Cir. 1974), where an inmate in a state hospital was beaten to death by other inmates. The administratrix of the decedent's estate brought an action under §1983 alleging that decedent's fourteenth amendment rights had been violated, and the Court ruled that the complaint adequately stated a cause of action.

Furthermore, in Doe v. New York City

Dept. of Social Services, supra, 649 F.2d 131, it was held that an agency that placed a child in foster care could be liable for the child's sexual abuse by her foster parent under §1983 because the agency failed to adequately supervise the child's placement. Significantly, the alleged inadequate supervision took place over a period extending from 1964 to 1977. The Court necessarily found, therefore, that at some point during that period the child had a right to protection. It was alleged that child abuse had taken place in 1971. See also Doe v. New York City Dept. of Social Services, 709 F.2d 782 (2d Cir.) (Doe II), cert. denied, 464 U.S. 864 (1983) (where the court upheld a jury verdict of $225,000 in the second trial of the same case).

Other cases further indicate that a right to protection as to the plaintiffs in this case existed well before 1980. In Gary

W. v. State of Louisiana, 437 F.Supp. 1209 (E.D. La. 1976), an action was brought on behalf of mentally retarded, physically handicapped and delinquent children challenging the adequacy of their placements in out-of-state institutions. Although the Court did not address whether the children had a due process right to protection, it seemingly went further holding that these children had a constitutional right to treatment. 437 F.Supp. at 1216. The Court reasoned that "[i]f an individual adult or child, healthy or ill, is confined by the government for some reason other than his commission of a criminal offense, the state must provide some benefit to the individual in return for the deprivation of his liberty." Id. at 1216. Therefore, "when the state chooses, for the most humane motives, to offer or require institutional confinement of a person, it must consider means that are capable of

achieving its purposes in ways that are least stifling to personal liberty, and it must offer a therapeutic consideration, a quid pro quo, for the deprivation." Id. at 1217.

Certainly, if the children in Gary W. had a right to treatment, they also had a right to be protected. Furthermore, the reasoning in Gary W. appears applicable to foster children who are placed by the state in foster homes selected by the state and pledged to be continually monitored by the state.

The constitutional right to protection under the Fourteenth Amendment was found to exist as early as 1973 in a case factually similar to Gary W. In New York St. Ass'n for Retarded Child, Inc. v. Rockefeller, 357 F.Supp. 752 (E.D.N.Y. 1973), the Court held that residents of state institutions for the mentally retarded were entitled to certain basic rights including the right to protec-

tion. The Court reasoned:

> Persons who live in state custodial institutions are owed certain constitutional duties by the state and its officials. In recent years there has been a great increase in the number of federal court cases involving inquiries into the conditions in state penal institutions and recognition that the federal Constitution does not cease to protect a man when he enters prison. See generally Turner, Establishing the Rule of Law in Prisons: A Manual for Prisoners' Rights Litigation, 23 Stan.L.Rev. 473 (1971); Hirschkop and Milemann, The Unconstitutionality of Prison Life, 55 U.Va.L.Rev. 795 (1969).
>
> With respect to persons confined under the criminal law, the standard has been succinctly stated by Circuit Judge Kaufman that a tolerable living environment is now guaranteed by law. Book Review, 86 Harv.L.Rev. 637, 639 (1973), citing Wright v. McMann, 387 F.2d 519 (2d Cir. 1967), on remand, 321 F.Supp. 127 (N.D.N.Y. 1970), aff'd in part and rev'd in part, 460 F.2d 126 (2d Cir.), cert. denied, 409 U.S. 885, 93 S.Ct. 115, 34 L.Ed.2d 141 (1972).
>
> * * *
>
> However, since persons residing in state institutions other than prisons may not be constitutionally "punished" (Robinson v. California, supra), some conditions tolerated in prisons may not be permissible in other institutions. Lollis v. New York State Dep't of Social Services, 328 F.Supp. 1115, 1118 (D.C. 1971), modifying, 322 F.Supp. 473 (S.D. N.Y. 1970).

357 F.Supp. at 764.

The Court concluded "[o]ne of the basic

rights of a person in confinement is protection from assault by fellow inmates or by staff." Id. "Another is the correction of conditions which violate 'basic standards of human decency.'" Id. at 765 (citing Brenneman v. Madigan, 343 F.Supp. 128, 133 (N.D. Cal. 1972)). Furthermore, the Court noted that the rights of these patients may rest on the Eighth or the Fourteenth Amendment. Id. at 764.

Certainly, the constitutional right to protection and its corollary duty to protect owed to prisoners and patients confined to institutional hospitals is no less deserved to foster children removed from the parents by the state and placed in foster homes approved and monitored by the state. The right to protection was clearly established by the time of the Supreme Court's 1976 decision in Estelle v. Gamble, supra, 429 U.S. 97. Moreover, earlier cases such as

Gary W., Rockefeller, Woodhouse and Staras demonstrate that this right was first clearly established as early as 1974. Accordingly, the defendants in this action could have been reasonably expected to know that their alleged failure to protect foster children placed by them in foster homes selected by them constituted a violation of plaintiffs' fourteenth amendment rights.

IV.

The violation of an established federal statutory right will also deprive a defendant of qualified immunity. Harlow v. Fitzgerald, supra, 457 U.S. at 818. In this regard, plaintiffs allege that defendants' actions prior to 1980 violated their clearly established rights under § 408, Title IV-A of the Social Security Act, 42 U.S.C. § 608. Accordingly, plaintiffs contend that defendants are not entitled to qualified immunity for their pre-1980 conduct. Citing Pennhurst State School v. Haldeman, 451 U.S. 1 (1980), defendants contend that § 408 of Title IV-A is merely a funding statute and does not, therefore, create rights in favor of plaintiffs such that it may serve as a proper basis for a §1983 claim.

The Aid to Families with Dependent Children-Foster Care ("AFDC-FC") program was first enacted in 1961 and authorizes federal

subsidies for the support and care of children who are made wards of the state pursuant to a court order.[1] 42 U.S.C. § 608. Section 408 of the Act and its implementing regulations establish federal standards that must be met by a state agency as prerequisites to receiving federal AFDC-FC funds. Specifically, § 408(f) requires an agency to develop a "plan" tailored to the needs of each child that will assure the child receives proper care. Periodic review of the necessity of retaining the child in foster care and the appropriateness of the care being provided is also required.

It is, in fact, well established that private individuals may bring suit to vindicate their rights under the Aid to Families with Dependent Children ("AFDC")

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[1] The AFDC-FC program was repealed, effective October 1, 1982, by the Adoption Assistance and Child Welfare Act of 1980, P.L. 96-272.

program. In Rosado v. Wyman, 397 U.S. 397 (1970) a class action was brought on behalf of a recipient challenging a New York statute that altered the standard-of-need computation under the AFDC program. Plaintiffs contended that the statute violated equal protection in that family recipients in some areas received lesser payments than in others. In addressing who may bring action to enforce provisions of the AFDC, the Court wrote:

> We have considered and rejected the argument that a federal court is without power to review state welfare provisions or prohibit the use of federal funds by the States in view of the fact that Congress has lodged in the Department of HEW the power to cut off federal funds for noncompliance with statutory requirements. We are most reluctant to assume Congress has closed the avenue of effective judicial review to those individuals most directly affected by the administration of its program. Cf. Abbott Laboratories v. Gardner, 387 U.S. 136 (1967); Association of Data Processing Service Organizations v. Camp, ante, p. 150; Barlow v. Collins, ante, p. 159.

397 U.S. at 420.

Rosado relied on King v. Smith, 392 U.S. 309 (1968), where a class action was successfully brought to overturn an Alabama's "sub-

stitute father" regulation under which AFDC payments were denied to the children of a mother who lived with an able-bodied male. Significantly, King was a §1983 action brought by AFDC recipients. Indeed, the King decision was later cited in Pennhurst State Schools v. Haldeman, supra, 451 U.S. at 17-18, as an example of a prior case where a statute enacted under the spending power was held to have granted privately enforceable rights to recipients.

In Miller v. Youakim, 440 U.S. 125 (1979), the Court reviewed §1983 brought to vindicate the rights of recipients under the same federal foster care provision at issue here. In Miller, four foster children were removed from their mother's home following a court determination of neglect. Two of the children were placed in the home of their older sister and her husband. The home of the older sister was approved as meeting the

licensing standards for foster family homes; however, the state refused to make AFDC-FC payments for the children's support because the children were related to their foster parents. In ruling that the state's distinction between related and unrelated foster homes was contrary to the intent of Congress, the Court emphasized that:

> The specific services offered by the AFDC-FC program further indicate that Congress did not intend to distinguish between related and unrelated foster caretakers. Congress attached considerable significance to the unique needs and special problems of abused children who are removed from their homes by court order, distinguishing them as a class from other dependent children:
>
> > "The conditions which make it necessary to remove [neglected] children from unsuitable homes often result in needs for special psychiatric and medical care of the children....
> >
> > "These are the most underprivileged children and often have special problems...." 108 Cong. Rec. 12692-12693 (1962) (remarks of Sen. Eugene McCarthy)."
>
> Section 408 embodies Congress' recognition of the peculiar status of neglected children in requiring that States continually supervise the care of these children, § 408(a)(2), develop a plan tailored to the needs of each foster child "to

assure that he receives proper care," § 408(f)(1), and periodically review both the necessity of retaining the child in foster care and the appropriateness of the care being provided. See ibid.; 45 CFR §§220.19(b), (c), 233.110 (a)(2)(ii) (1977). Additionally, the States must work to improve the conditions in the foster child's original home or to transfer him to a relative when feasible, § 408(f)(1); see supra, at 137. This procedure comports with Congress' preference for care of dependent children by relatives, a policy underlying the categorical assistance program since its inception in 1935. See S. Rep. No. 628, 74th Cong., 1st Sess., 16-17 (1935); H.R. Rep. No. 615, 74th Cong., 1st Sess., 10-12 (1935); Burns v. Alcala, 420 U.S., at 581-582; § 401, as amended, 42 U.S.C. § 601, supra, at 132-133. We do not believe that Congress, when it extended assistance to foster children, meant to depart from this fundamental principle. Congress envisioned a remedial environment to correct the enduring effects of past neglect and abuse.

Accordingly, the AFDC-FC was not merely a funding statute. Upon the enactment of the AFDC-FC program in 1961, children who met the eligibility requirements had a right to proper care and placement in a safe foster home. These statutory rights were, therefore, clearly established prior to 1980 and at all times relevant to these proceedings. If the defendants in this action did not know of the existence of these statutory rights,

they certainly should have know of these statutory rights, they certainly should have known of their existence.[2]

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[2] Two of the six plaintiffs were put in foster homes pursuant to voluntary placement agreements. The disposition of their claims premised on a statutory violation, § 408 of Title A, 42 U.S.C. § 608, differs significantly from the statutory claims of plaintiffs who were placed in foster care involuntarily. Beginning in 1961, children made wards of the state pursuant to a court order fell under the definition of "dependent child" contemplated by the statute. In 1961, § 408(a) stated that the term "dependent child" shall include a child who was removed from the home of the natural parents as a result of judicial determination to the effect that continuation of such would be contrary to the welfare of the child. On June 17, 1980, the definition was amended to include children subject to voluntary placement agreements.

Plaintiff L.J. has been in foster care pursuant to a voluntary placement agreement since 1977. Consequently, any claim asserted by L.J. premised on a statutory violation would fail as to violations said to have occurred prior to 1980. The second child who was not placed pursuant to a Court order is O.S. Since this child became a foster child in January, 1984, a claim of O.S. alleging violation of his statutory rights would exist at all times of the alleged violations.

Importantly, plaintiff L.J.'s claim against the state under the existence of an affirmative duty of protection survives as to those allegations not covered by statute.

V.

Furthermore, the AFDC-FC is now well established as a proper basis upon which to pursue a §1983 action. Miller v. Youakim, supra, Lynch v. King, 550 F.Supp. 325 (D.Mass. 1982), aff'd, 719 F.2d, 504 (1st Cir. 1983).

Accordingly, it is this 27th day of July, 1987, by the United States District Court for the District of Maryland, ORDERED:

1) That defendants' motion for partial summary judgment BE, and the same hereby IS, DENIED; and

2) That the Clerk mail copies of this Memorandum and Order to counsel of record.

/S/
Joseph C. Howard
United States District Judge

§ 608. Payment to States for foster home care of dependent children; definitions

Effective for the period beginning May 1, 1961--

(a) the term "dependent child" shall, notwithstanding section 606(a) of this title, also include a child (1) who would meet the requirements of such section 606(a) or of section 607 of this title except for his removal after April 30, 1961, from the home of a relative (specified in such section 606(a)) pursuant to a voluntary placement agreement entered into by the child's parent or legal guardian, or as a result of a judicial determination to the effect that continuation therein would be contrary to the welfare of such child, (2) whose placement and care are the responsibility of (A) the State or local agency administering the State plan approved under section 602 of this title, or (B) any other public agency with whom the State agency administering or supervising the administration of such State plan has made an agreement which is still in effect and

which includes provision for assuring development of a plan, satisfactory to such State agency, for such child as provided in paragraph (f)(1) and such other provisions as may be necessary to assure accomplishment of the objectives of the State plan approved under section 602 of this title, (3) who has been placed in a foster family home or child-care institution as a result of such voluntary placement agreement or judicial determination, and (4) who (A) received aid under such State plan in or for the month in which such agreement was entered into or court proceedings leading to such determination were initiated, or (B)(i) would have received such aid in or for such month if application had been made therefor, or (ii) in the case of a child who had been living with a relative specified in section 606(a) of this title within 6 months prior to the month in which such agreement was entered into or such proceedings were initiated, would have received such aid in or for such month if in such month he

had been living with (and removed from the home of) such a relative and application had been made therefor;

(b) the term "aid to families with dependent children" shall, notwithstanding section 606(b) of this title, include also foster care in behalf of a child described in paragraph (a) of this section--

(1) in the foster family home of any individual, whether the payment therefor is made to such individual or to a public or nonprofit private child-placement or child-care agency, or

(2) in a child-care institution, whether the payment therefor is made to such institution or to a public or nonprofit private child-placement or child-care agency, but subject to limitations prescribed by the Secretary with a view to including as "aid to families with dependent children" in the case of such foster care in such institutions only

those items which are included in such term in the case of foster care in the foster family home of an individual.

(c) the number of individuals counted under clause (A) of section 603(a)(1) of this title for any month shall include individuals (not otherwise included under such clause) with respect to whom expenditures were made in such month as aid to families with dependent children in the form of foster care; and

(d) services described in paragraph (f)(2) of this section shall be considered as part of the administration of the State plan for purposes of section 603(a)

(3) of this title; but only with respect to a State whose State plan approved under section 602 of this title--

(e) includes aid for any child described in paragraph (a) of this section, and

(f) includes provision for (1) development of a plan for each such child (including periodic

review of the necessity for the child's being in a foster family home or child-care institution) to assure that he receives proper care and that services are provided which are designed to improve the conditions in the home from which he was removed or to otherwise make possible his being placed in the home of a relative specified in section 606(a) of this title, and (2) use by the State or local agency administering the State plan, to the maximum extent practicable, in placing such a child in a foster family home or child-care institution, of the services of employees, of the State public-welfare agency referred to in section 722(a) of this title (relating to allotments to States for child welfare services under sections 721 and 728 of this title) or of any local agency participating in the administration of the plan referred to in such section, who perform functions in the administration of such plan.

For the purposes of this section, the term "foster family home" means a foster family home for

children which is licensed by the State in which it is situated or has been approved, by the agency of such State having responsibility for licensing homes of this type, as meeting the standards established for such licensing; and the term "child-care institution" means a nonprofit private child-care institution, or a public child-care institution which accommodates no more than twenty-five children, which is licensed by the State in which it is situated or has been approved, by the agency of such State responsible for licensing or approval of institutions of this type, as meeting the standards established for such licensing; but the term shall not include detention facilities, forestry camps, training schools, or any other facility operated primarily for the detention of children who are determined to be delinquent.

For the purpose of this section, the provisions of subsections (d), (e), (f), and (g) of section 672 of this title shall apply.

§ 627. Foster care protection required for additonal payments

(a) Requisite additional steps to qualify

If, for any fiscal year after fiscal year 1979, there is appropriated under section 620 of this title a sum in excess of $141,000,000, a State shall not be eligible for payment from its allotment in an amount greater than the amount for which it would be eligible if such appropriation were equal to $141,000,000, unless such State--

(1) has conducted an inventory of all children who have been in foster care under the responsibility of the State for a period of six months preceding the inventory, and determined the appropriateness of, and necessity for, the current foster placement, whether the child can be or should be returned to his parents or should be freed for adoption, and the services necessary to facilitate either the return of the child or the placement of the child for adoption or legal guardianship; and

(2) has implemented and is operating to the satisfaction of the Secretary--

(A) a statewide information system from which the status, demographic characteristics, location, and goals for the placement of every child in foster care or who has been in such care within the preceding twelve months can readily be determined;

(B) a case review system (as defined in section 675(5) of this title) for each child receiving foster care under the supervision of the State; and

(C) a service program designed to help children, where appropriate, return to families from which they have been removed or be placed for adoption or legal guardianship.

(b) Reduction of allotment

If for each of any two consecutive fiscal years after the fiscal year 1979, there is appropriated under section 620 of this title a sum equal to $266,000,000, each State's allotment amount for any

fiscal year after such two consecutive fiscal years shall be reduced to an amount equal to its allotment for the fiscal year 1979, unless such State--

(1) has completed an inventory of the type specified in subsection (a)(1) of this section;

(2) has implemented and is operating the program and systems specified in subsection (a)(2) of this section; and

(3) has implemented a preplacement preventive service program designed to help children remain with their families.

(c) Presumption

Any amounts expended by a State for the purpose of complying with the requirements of subsection (a) or (b) of this section shall be conclusively presumed to have been expended for child welfare services.

§ 671. State plan for foster care and adoption assistance

(a) Requisite features of State plan

In order for a state to be eligible for payments under this part, it shall have a plan approved by the Secretary which--

(1) provides for foster care maintenance payments in accordance with section 672 of this title and for adoption assistance in accordance with section 673 of this title;

(2) provides that the State agency responsible for administering the program authorized by part B of this subchapter shall administer, or supervise the administration of, the program authorized by this part;

(3) provides that the plan shall be in effect in all political subdivisions of the State, and, if administered by them, be mandatory upon them;

(4) provides that the State shall assure that the programs at the local level assisted under this part will be coordinated with the programs at

the State or local level assisted under parts A and B of this subchapter, under subchapter XX of this chapter, and under any other appropriate provision of Federal law;

(5) provides that the State will, in the administration of its programs under this part, use such methods relating to the establishment and maintenance of personnel standards on a merit basis as are found by the Secretary to be necessary for the proper and efficient operation of the programs, except that the Secretary shall exercise no authority with respect to the selection, tenure of office, or compensation of any individual employed in accordance with such methods;

(6) provides that the State agency referred to in paragraph (2) (hereinafter in this part referred to as the "State agency") will make such reports, in such form and containing such information as the Secretary may from time to time require, and comply with such provisions as the Secretary may from time to time find necessary to

assure the correctness and verification of such reports;

(7) provides that the State agency will monitor and conduct periodic evaluations of activities carried out under this part;

(8) provides safeguards which restrict the use of or disclosure of information concerning individuals assisted under the State plan to purposes directly connected with (A) the administration of the plan of the State approved under this part, the plan or program of the State under part A, B, C, or D of this subchapter or under subchapter I, V, X, XIV, XVI (as in effect in Puerto Rico, Guam, and the Virgin Islands), XIX, or XX of this chapter, or the supplemental security income program established by subchapter XVI of this chapter, (B) any investigation, prosecution, or criminal or civil proceeding, conducted in connection with the administration of any such plan or program, (C) the administration of any other Federal or federally assisted program which provides assistance,

in case or in kind, or services, directly to individuals on the basis of need, and (D) any audit or similar activity conducted in connection with the administration of any such plan or program by any governmental agency which is authorized by law to conduct such audit or activity; and the safeguards so provided shall prohibit disclosure, to any committee or legislative body (other than an agency referred to in clause (D) with respect to an activity referred to in such clause), of any information which identifies by name or address any such applicant or recipient; except that nothing contained herein shall preclude a State from providing standards which restrict disclosures to purposes more limited than those specified herein, or which, in the case of adoptions, prevent disclosure entirely;

(9) provides that where any agency of the State has reason to believe that the home or institution in which a child resides whose care is being paid for in whole or in part with funds provided under

this part or part B of this subchapter is unsuitable for the child because of the neglect, abuse, or exploitation of such child, it shall bring such condition to the attention of the appropriate court or law enforcement agency;

(10) provides for the establishment or designation of a State authority or authorities which shall be responsible for establishing and maintaining standards for foster family homes and child care institutions which are reasonably in accord with recommended standards of national organizations concerned with standards for such institutions or homes, including standards related to admission policies, safety, sanitation, and protection of civil rights, and provides that the standards so established shall be applied by the State to any foster family home or child care institution receiving funds under this part or part B of this subchapter;

(11) provides for periodic review of the standards referred to in the preceding paragraph and

amounts paid as foster care maintenance payments and adoption assistance to assure their continuing appropriateness;

(12) provides for granting an opportunity for a fair hearing before the State agency to any individual whose claim for benefits available pursuant to this part is denied or is not acted upon with reasonable promptness;

(13) provides that the State shall arrange for a periodic and independently conducted audit of the programs assisted under this part and part B of this subchapter, which shall be conducted no less frequently than once every three years;

(14) provides (A) specific goals (which shall be established by State law on or before October 1, 1982) for each fiscal year (commencing with the fiscal year which begins on October 1, 1983) as to the maximum number of children (in absolute numbers or as a percentage of all children in foster care with respect to whom assistance under the plan is provided during such year) who, at any

time during such year, will remain in foster care after having been in such care for a period in excess of twenty-four months, and (B) a description of the steps which will be taken by the State to achieve such goals;

(15) effective October 1, 1983, provides that, in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home;

(16) provides for the development of a case plan (as defined in section 675(1) of this title) for each child receiving foster care maintenance payments under the State plan and provides for a case review system which meet the requirements described in section 675(5)(B) of this title with respect to each such child; and

(17) provides that, where appropriate, all steps will be taken, including cooperative efforts with the State agencies administering the plans ap-

proved under parts A and D, to secure an assignment to the State of any rights to support on behalf of each child receiving foster care maintenance payments under this part.

§ 675. Definitions

As used in this part or part B of this subchapter:

(1) The term "case plan" means a written document which includes at least the following: A description of the type of home or institution in which a child is to be placed, including a discussion of the appropriateness of the placement and how the agency which is responsible for the child plans to carry out the voluntary placement agreement entered into or judicial determination made with respect to the child in accordance with section 672(a)(1) of this title; and a plan for assuring that the child receives proper care and that services are provided to the parents, child, and foster parents in order to improve the conditions in the parents' home, facilitate return of the child to his own home or the permanent placement of the child, and address the needs of the child while in foster care, including a discussion of the appropriateness of the services that have been provided to the child under the plan. Where

appropriate, for a child age 16 or over, the case plan must also include a written description of the programs and services which will help such child prepare for the transition from foster care to independent living.

* * *

(5) The term "case review system" means a procedure for assuring that--

(A) each child has a case plan designed to achieve placement in the least restrictive (most family like) setting available and in close proximity to the parents' home, consistent with the best interest and special needs of the child,

(B) the status of each child is reviewed periodically but no less frequently than once every six months by either a court or by administrative review (as defined in paragraph (6)) in order to determine the continuing necessity for and appropriateness of the placement, the extent of compliance with the

case plan, and the extent of progress which has been made toward alleviating or mitigating the causes necessitating placement in foster care, and to project a likely date by which the child may be returned to the home or placed for adoption or legal guardianship; and

(C) with respect to each such child, procedural safeguards will be applied among other things, to assure each child in foster care under the supervision of the State of a dispositional hearing to be held, in a family or juvenile court or another court (including a tribal court) of competent jurisdiction, or by an administrative body appointed or approved by the court, no later than eighteen months after the original placement (and periodically thereafter during the continuation of foster care), which hearing shall determine the future status of the child (including, but not limited to, whether the

child should be returned to the parent, should be continued in foster care for a specified period, should be placed for adoption, or should (because of the child's special needs or circumstances) be continued in foster care on a permanent or long-term basis); and procedural safeguards shall also be applied with respect to parental rights pertaining to the removal of the child from the home of his parents, to a change in the child's placement, and to any determination affecting visitation privileges of parents.